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# Overhauling the Federal Trade Commission

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It is time for Congress to overhaul the FTC and bring it into the 21st century.

As it stands today, the FTC lacks teeth. Its jurisdiction is divided. It wastes time in turf wars with the Department of Justice (DOJ) while failing to confront the increasing concentration in our economy, in the tech sector most obviously. And it is woefully unaccountable. The agency as presently constituted is in no shape to ensure competition in today's markets, let alone tomorrow's.

# The Problem

The FTC has stood by as actors in digital markets violated the law to obtain monopoly power.

In a competitive market, extraordinarily high profit margins should not persist because those margins stimulate entry of new competitors over time, causing lower prices. Yet digital markets have been persistently dominated by a few actors who boast extraordinarily high profits. And we are seeing the same pattern in other industries. This trend toward monopolization has occurred on the FTC's watch.

Three years ago, the European Union fined Google \$2.7 billion for inserting anticompetitive biases into its search algorithm and lying about it. A leaked FTC report has revealed that the FTC knew about this conduct as early as 2012 but did nothing. The FTC's inaction allowed Google to entrench its market share for years using deception.

Similarly, Google and Facebook have acquired hundreds of companies in the last two decades, yet the FTC never once intervened to try to block any of these acquisitions. Google and Facebook are now some of the biggest companies in the world. Last year, the FTC fined Facebook for flagrantly violating an earlier consent decree—but the fine the FTC touted as a "record" was just 2.5% of the revenue Facebook brought in while violating the earlier decree.

The reality is the FTC is not putting even its current resources to effective use because the FTC is poorly designed.

## Accountability

When Congress designed the FTC more than a century ago, it attempted to insulate the agency from political accountability or control. The idea was to appoint neutral "administrators" to oversee the nation's competitive markets.

That project has failed. The FTC has proven lethargic, unwieldy, susceptible to agency capture, and prone to turf wars. Its multi-member commission diffuses responsibility, making it harder to identify a specific person who can be held accountable for enforcement or regulatory decisions. And the lack of meaningful supervision from the political branches has complicated oversight, and slowed reform.

The problem is particularly acute in the antitrust context. Not only is antitrust authority divided between the five commissioners of the FTC, but it is also divided between the FTC and the DOJ. This situation makes assigning responsibility for enforcement decisions incredibly difficult, if not impossible. As a result, while the FTC has stood by as major corporations have consolidated their power and stifled competition, the political branches have had few tools to spur the FTC into action or shape its priorities.

### **Revolving door conflicts**

A second design problem is Congress's failure to meaningfully guard FTC officials from financial conflicts of interest. Officials at the FTC are supposed to enforce the law against Big Tech companies, and all corporations. This duty sometimes calls for imposing millions or even billions of dollars in fines. But many high-level officials begin working for Big Tech right after leaving the FTC. The lack of a sufficient cooling-off period raises the concern that senior FTC officials will be too timid to discharge their duties against Big Tech and other corporate giants because so many of them intend to ask those companies for jobs right away.

### **Outdated tool kit**

A third problem is that the FTC was designed decades before digital markets existed and thus lacks adequate tools for today's challenges. To take just one example, the FTC ordinarily may not impose fines against a company for violations of consumer protection laws until the company violates those laws twice. That limit poses problems for digital markets, which are far more dynamic than older and more traditional markets. Digital markets are so fluid that some companies can violate the law and yet escape civil penalties simply because their practices change quickly. Put simply, the FTC is currently not structurally suited to address the unique challenges of dynamic digital markets.

And all these deficiencies call for structural solutions.

“ For too long our nation has put off accounting for the price we paid in return for the benefits of the online platforms that now dominate American culture and industry.”

**Senator Josh Hawley**

LETTER TO FTC CHAIRMAN JOE SIMMONS

# A Proposal for Reform

## Restructure the FTC

Digital markets have revealed that the experiment with insulated, unaccountable enforcement officials has not worked. To rectify these problems, Congress should pursue multifaceted structural reform.

First, **Congress should relocate the FTC to the DOJ** and provide for clear and direct oversight.

Second, **Congress should eliminate the multi-member commission** and replace it with a single Director. Like the head of the Antitrust Division, this Director would report directly to the Associate Attorney General. And to ensure regular oversight by Congress, the Director would have to be confirmed by the Senate every five years.

Third, **Congress should end the jurisdictional overlap regarding mergers and acquisitions** that has paralyzed enforcement and reassign that responsibility to the Antitrust Division, whose work a restructured FTC would aid and support.

Fourth, **Congress should create a new "Digital Market Research Section"** within the FTC composed of technologists, economists, and market specialists. This new section would be tasked with conducting comprehensive studies about digital markets, supporting the enforcement litigation of the DOJ, and reporting regularly to Congress.

This multi-pronged restructuring would streamline the FTC, making it more efficient, more effective, and more accountable

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## POSSIBLE TOPICS OF STUDY FOR THE DIGITAL MARKET RESEARCH SECTION

- ▶ the collection, maintenance, use, or dissemination of personal data
- ▶ the use of behavioral psychology and A/B testing by tech companies, including the effect that testing has on free choice
- ▶ the methods companies use to curate content, either manually or through algorithms
- ▶ the use of selective enforcement of terms of service, including enforcement of speech codes
- ▶ the effect of machine-learning and artificial intelligence on competition
- ▶ the use of personalized data to create different prices for different consumers
- ▶ the kinds of privileges that platforms offer developers, how those privileges compare to those retained by the platform, and how those privileges change over time
- ▶ use of data-collection by platforms to learn about rival companies and potential rival companies

## Provide Greater Tools for Robust Enforcement

The reformed FTC should be given better and updated enforcement tools. Congress should give the reformed FTC enforcement authority to deconstruct barriers to entry in digital markets and authority to impose penalties for first-time offenses. Congress should also assign concurrent enforcement authority to other agencies.

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### Enforcement authority to remove barriers to entry

Congress cannot turn back the clock and retroactively prevent Big Tech actors from trying to monopolize digital markets. But it can act to deconstruct some of the barriers to entry those companies have created. To help inject competition in digital markets, Congress should give a reformed FTC authority to enforce new data interoperability and portability requirements, as well as authority to limit the amount of data large firms can acquire or use.\*

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### Civil Penalties for first-time offenses

Under current law, the FTC ordinarily is prohibited from imposing civil penalties until a company violates the law twice. That limit greatly constrains the ability of the agency, especially in digital markets, which are much more dynamic than other markets. Congress should give the reformed FTC authority to impose civil penalties for first-time offenses. This increase in civil penalty liability should be paired with appropriate due process protections.

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### Concurrent enforcement authority

Congress can also act to ensure that any future failure by the FTC to appropriately enforce competition and consumer-protection laws does not negatively affect the entire country. Congress should give state attorneys general concurrent authority to enforce the laws the FTC currently is authorized to enforce. State attorneys general already have authority to enforce some of the laws that the FTC is duty-bound to enforce, so any congressional action here already has precedent.

## Close the Revolving Door

Current ethics laws are relatively limited. They require, for example, that senior FTC officials abstain from representing a company in front of the FTC for one year and abstain from ever participating in a matter in which they personally participated while at the FTC. These, and similar provisions, are designed to avoid the problem of using inside knowledge of specific cases unfairly for the benefit of an industry participant.

\*These mandates are spelled out more fully in Senator Hawley's Do Not Track Act (S. 1578) and the ACCESS Act of 2019 (S. 2658).

But little in the ethics laws targets the equally important interest of preventing the prospect of future employment from impeding current duties. According to one report, two-thirds of recent senior officials at the FTC have revolving-door relationships with tech companies. Many of these officials represent or work for Big Tech right after leaving the FTC. Taking appropriately vigorous enforcement action against those companies is not in the financial interest of senior officials because they will soon seek jobs from those companies. Nothing in the ethics laws adequately addresses this problem.

To ensure that the prospect of future employment does not make enforcement officials too timid, Congress should impose stricter ethics requirements on senior personnel in the reformed FTC, as well as in the Antitrust Division. For example, instead of merely limiting the ability of individuals to work on specific matters or to represent companies in front of the agency, Congress could add ethics laws that ban senior officials from working for very large companies at all for a few years.

An appropriate cooling-off period would balance two interests: 1) the need to prevent the prospect of future employment from impeding current enforcement, and 2) the need not to hamper employment opportunities so severely that individuals are unwilling to accept employment with the federal agency in the first place. Congress should consider whether a two-year ban on working for or representing any company with more than \$30 billion in annual revenue is an appropriate balance.

### **Eliminate constitutional problems**

Congress should take the opportunity, when reforming the FTC, to also eliminate constitutionally problematic aspects of that agency. In general, when a government agency brings an enforcement action against a person, the Constitution guarantees that person the right to contest the facts in court. But under current law, fact-findings by the FTC are binding in federal courts. 15 U.S.C. § 45(c). In the light of Supreme Court cases decided long after the FTC was established, the failure to give parties any opportunity to litigate factual disputes in federal courts is at the very least constitutionally questionable. Congress should consider fixing this infirmity by guaranteeing the right to litigate facts in federal court.

While giving defendants adequate due process rights, this reform would also enable courts to correct errors that would ordinarily cause enforcement to be too lax. For example, a fact-finding by the FTC that defines the relevant market might be bad for a defendant in one case but might, as a precedent, foreclose FTC enforcement in the future. In instances like this, affording the defendant the due process right to contest fact findings may lead to greater, not less, enforcement in the future.

# Summary of Proposals

## Accountability

- Restructure the FTC to operate within the DOJ
  - The FTC would be headed by a single Director (like the FBI), instead of a multi-member commission
  - The Director would report to the Associate Attorney General
  - The Director would be Senate-confirmed for renewable five-year terms
  - The FTC would gain new market analysis authority to direct its enforcement, assist the Antitrust Division, and inform Congress
- Transfer all authority to review mergers and acquisitions to the Antitrust Division of the DOJ

## Create more tools for robust enforcement

- Create authority to enforce rules requiring interoperability, data portability, and data minimization
- Create civil penalties for first-time offenses
- Give the FTC greater research and reporting mandates
- Give state attorneys general concurrent enforcement authority

## Ethics

- Impose greater ethics requirements and prohibit senior officials from working for or representing large companies for a cooling-off period

## Fix constitutional problems